No. 16007

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONROE B. HARRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was indicted by the Grand Jury for the Southern District of California on August 1, 1956, on a charge of breaking into a building used as a post office [Clk. T. 2].[1]

On August 6, 1956, the defendant was arraigned and on August 13, 1956, the defendant entered a plea of not guilty to the charge in the indictment [Clk. T. 5, 6]. On September 11, 1956, jury trial began in the United States District Court for the Southern District of California, the Honorable Ben Harrison presiding [Clk. T. 8]. On September 12, 1956, the case was concluded by a verdict of guilty as to the appellant on the charge in the indictment [Clk. T. 15].

On October 1, 1956, it was adjudged that appellant be committed to the custody of the Attorney General for a period of five years [Clk. T. 3].

[1]Clk. T. refers to the Clerk's Transcript of Record.

On October 3, 1956, a timely notice of appeal was filed [Clk. T. 17].

The District Court had jurisdiction of this action under United States Code, Title 18, Sections 2115 and 3231.

This Court has jurisdiction under the provisions of United States Code, Title 28, Section 1291.

Statement of the Case.

In the early morning hours of July 8, 1956, at approximately 1 a. m., one Robert E. Lee, who lived opposite the back of the instant United States Post Office, heard a noise, and, upon looking out of his rear window, saw men in the alley behind the Post Office and heard their voices [R. T. 17-18, 20].[2] In addition, Mr. Lee also observed a truck with the red letters "CENTRAL" on top thereof [R. T. 18].

At approximately 2 a. m. on July 8, 1956, Mr. Lee again heard a noise from the rear of the Post Office and called the police [R. T. 19]. He saw an object on the ground in the alley behind the Post Office, and when he later went to the rear of the Post Office after police officers had arrived, he observed a large safe lying on the ground in the same position in which he had previously observed the object from his window [R. T. 20].

Later examination of the Post Office revealed that there was a hole in the roof caused by several boards which had been pulled up from the roof [R. T. 41-43]. Moreover, two safes, one large and one small, had been removed from the premises of the Post Office and the petty cash drawer of the Post Office had been pried open and ninety-five cents in change was missing [R. T. 39-41]. The

[2]R. T. will refer to the Reporter's Transcript.

Superintendent of the Post Office, Wilbur N. Ashford, also testified that the rear platform doors of the Post Office were open as well as the door to the Inspector's lookout, which opened off the back platform [R. T. 39]. The large safe which was missing from the inside of the Post Office was found by Mr. Ashford to be lying on its side in the loading dock area just off the platform at the rear of the Post Office [R. T. 39].

The codefendant, Thomas B. Venters (whose case of receiving stolen property was consolidated with the instant case) was arrested at 2:20 a. m. on the morning of July 8, 1956 [R. T. 60, 62] by Deputy Sheriff Donald E. Zimmerman who first observed two men standing at the corner of the alley behind the Post Office and then later arrested Venters and others in an automobile parked approximately a block away towards which the two men had run [R. T. 95, 97].

The appellant was arrested by Los Angeles Police Officer Elmer N. Owens approximately one and one-half blocks from the burglarized Post Office at approximately 3 a. m. on the morning of July 8, 1956 [R. T. 45-46, 57]. For approximately 25 minutes before he observed the appellant that night, Officer Owens had been staked out upon a truck bearing the red letters "CENTRAL" [R. T. 46-47, 52]. Owens saw Harris approach on foot, get into the truck and drive the truck away for approximately a block and a half, at which time the appellant was placed under arrest [R. T. 45, 47-48]. The rear of the truck platform was observed to be damaged [R. T. 49].

Upon searching Harris, Owens observed that dirt was matted in his hair, his hands were scraped and bleeding and there was blood upon the appellant's shirt [R. T. 49]. At the time of arrest, appellant told Owens that he did

not know anything about the truck [R. T. 51], and that he had obtained three rides that evening by hitch-hiking. The appellant further stated that the last person who had given him a ride, a man in a green 1956 Chevrolet automobile, had asked him if he would like to make three or four dollars by driving a truck, to which appellant assented since he did not have any funds on him [R. T. 51-52]. Appellant stated that he was driven to the location of the truck by the man in the 1956 green Chevrolet sedan [R. T. 52].

In contrast to the story told by appellant, Officer Owens testified that no automobile drove the appellant to where the truck was parked [R. T. 52]. Approximately $3.40 was found in Harris' possession at the time he was arrested [R. T. 53]. Later in the evening, appellant was asked by Officer Owens if he knew a man by the name of Marvin Williams and Harris replied that he did not [R. T. 52]. In appellant's possession at the time of his arrest was a notebook containing the name, address and phone number of Marvin Williams [R. T. 53].

The codefendant Thomas B. Venters testified that Harris came to his house on the morning of July 7, 1956, and asked if he could rent a garage for a friend by the name of Williams [R. T. 146-148, 166]. It was in Venters' garage that the second small safe, which had been taken from the burglarized Post Office, was found [R. T. 95, 97].

Marvin Williams testified that on July 8, 1956, between 1:30 and 2 a. m. the appellant came to his home and asked

him to help him, the appellant, move something [R. T. 100-101]. Williams then went to an automobile with the appellant and drove, together with codefendant Venters, to the vicinity of the Post Office [*ibid*]. There Williams observed a large safe lying on its side on the ground behind the Post Office and appellant then stated to the persons gathered there "Let's see if we can lift this" [R. T. 102-103].

Williams also testified that he was arrested on July 8, 1956, and was thereafter beaten by officers at the 77th Street Station of the Los Angeles Police Department [R. T. 120-121]. Postal Inspectors had nothing to do with the arrest or beating of the witness Williams [R. T. 119]. The District Judge extensively questioned the witness concerning whether he was telling the truth at the time of trial and Williams stated that the testimony which he was giving at the trial was the truth, stating that when he was first arrested he told the officers a lie to the effect that he had been in the vicinity of the Post Office to get a drink and that he did not know anything else about the Post Office [R. T. 125]. Williams testified that he later told the officers that his previous statements were a lie and that he then told them the truth and that he was telling the truth on the stand [R. T. 125-126].

ARGUMENT.

I.

The Evidence Was Sufficient to Support the Verdict of Guilty.

At pages 7 through 10 of his brief, appellant cites various California cases supporting general propositions of law to the effect that the instant evidence was insufficient to uphold the conviction. Other comments upon the evidence are made by the appellant at pages 1 through 5 of his brief.

We believe that the evidence set forth in the appellee's statement of facts is more than sufficient to uphold the verdict of guilty. Appellant was in possession of a stolen safe in early morning hours in the back of a just-burglarized Post Office [R. T. 102-103]. Appellant moreover attempted to lift the safe and went to the trouble of obtaining assistance from his school friend, Marvin Williams [R. T. 100-101, 122].

Next, appellant was arrested at 3 a. m. in the vicinity of the Post Office [R. T. 48, 57]. The appearance of the appellant could lead the jury to believe that it was he who had gained access to the roof of the Post Office, in view of his bloody and scraped condition [R. T. 48-49].

Moreover, appellant told the arresting officer several untruths at the time of his arrest. The first untruth was that a man in a green Chevrolet had driven him to the vicinity of the truck with the red letters "CENTRAL" upon it. The second was that he had no funds that evening. The third untruth was that he did not know a man by the name of Marvin Williams. The story told the officer was entirely inconsistent with that of the witness Elijah Washington, the only witness testifying on behalf of the appellant. Washington testified that he had met the ap-

pellant in the early morning hours of July 8, 1956, and had driven him to the vicinity of Vernon and Central [R. T. 177-178], whereas the appellant had told the officer that he had hitched a ride from three separate unknown individuals [R. T. 51].

Also, appellant was in possession of the truck which obviously had been used to transport the small safe to the garage of codefendant Venters [R. T. 18].

In addition, the garage in which one of the stolen safes was found had been (according to the codefendant Venters) rented by the appellant in the morning of July 7, 1956 [R. T. 146-148, 166].

Without reviewing the California cases cited by the appellant at pages 8-9 of his brief to the effect that unexplained possession of stolen property is not by itself sufficient to justify conviction of burglary, it is sufficient to say that the rule is to the contrary in federal courts. In *Booth v. United States,* 154 F. 2d 73 (C. A. 9, 1946), it was stated by this Court:

> "From the possession of the stolen securities there arises not only an inference which the jury *may* draw, but a presumption which *must* be recognized by the jury that the possessor is the thief . . . it is a part of the common experience of man that the possessor of goods soon after a theft is the thief."

In *Morandy v. United States,* 170 F. 2d 5 (C. A. 9, 1948), it was stated by this Court:

> "As seen, [the car] had recently been stolen in Indiana; and appellant did not take the stand or in any way attempt to explain his possession of it in California. The courts have long thought that possession in such circumstances warrants the inference that the possessor was the thief. This judicially

sanctioned inference, we may add, has its genesis in human experience, that is to say, it is not a rule conveniently concocted by judges to fill gaps in the proof."

In *Edwards v. United States,* 139 F. 2d 365 (C. A. D. C., 1944), the only evidence against the appellant therein was that the crimes of burglary and larceny had been committed in a store and that a week after the crime was committed the appellant was arrested with the codefendant (who had been identified as being the robber) and the appellant was in possession of a part of the stolen property. No evidence was offered to explain the appellant's possession of the stolen property or his association with Anderson. The Court went on to say that:

> "This Court has held that possession of recently stolen property, unexplained, is sufficient to support a verdict of guilty in larceny. Housebreaking, robbery and burglary are merely aggravated forms of larceny and there is no reason why evidence competent in one case should not be competent, also, in the others. In fact, the Supreme Court has extended the rule so far as to declare that possession of the fruits of crime, recently after its commission, may be of controlling weight in a *murder* case, unless explained by the circumstances or accounted for in some way consistent with innocence."

The judgment of the trial court was affirmed.

In the case of *McNamara v. Henkel,* 266 U. S. 520 (1913), the question before the Supreme Court was whether there had been any competent evidence to connect the appellant with the crime of burglary. A building had been broken into which was used as a garage and stolen therefrom was an automobile and some rugs. It was shown that the automobile had been taken out of the building and rolled about forty feet down the street where,

according to the testimony, the appellant was seen standing in front of the car "trying to crank it." Three unidentified men also were with him. The Supreme Court held:

> "The District Court held that this was evidence connecting the appellant with the crime. . . . We agree with this view. . . . It is objected that while possession of property recently stolen may be evidence of participation in the larceny, the apparent possession of the automobile by the appellant affords no support for a conclusion that he committed the burglary, the crime with which he was charged. The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force."

In the instant case, appellant was standing next to a large safe stolen from an immediately adjacent Post Office and was attempting to lift such safe. He was also arrested in a truck which had been used in the commission of the burglary and larceny of the safes. According to one of the codefendants he also was responsible for rental of the garage in which one of the other stolen safes was later found. In view of the foregoing cases, we believe that the evidence in the Court below was more than sufficient to justify the judgment of the trial court.

II.

No Hearsay Evidence Was Admitted Against the Appellant.

At pages 5 and 10 of the appellant's brief, it is argued that hearsay statements were introduced at the time of trial. Whether these statements were competent and admissible evidence as to the codefendant Venters is not a question which this Court is called upon to answer. The question is whether such evidence prejudiced the appellant.

At the times that the objected-to evidence was introduced against the codefendant Venters, it always was specifically made clear by the prosecution that such evidence was offered solely as to Venters and not as to the appellant [R. T. 76, 77, 78, 82, 94]. The trial court also painstakingly made clear to the jury that it should disregard such evidence insofar as the appellant Harris was concerned [R. T. 76, 94, 169, 181-182, 185, 224-225]. In view of the foregoing, we deem it inconceivable that the jury could have misunderstood and considered such evidence in determining the case of the appellant. To believe otherwise, would be to disregard our system of expecting juries to follow the Court's instructions of law.

Delli Paoli v. United States, 352 U. S. 232, 236-243 (1957).

III.

No Forced Confession or Violation of Due Process Arose by Reason of the Brutality Accorded the Witness Marvin Williams.

We deplore the brutality accorded to the witness Marvin F. Williams. We trust that this statement alone will make clear our position upon that point. This does not mean, however, that we believe we should not have used the testimony of the witness, or that the witness' testimony was thereby incompetent to be received in evidence or that the entire case should have been dismissed for lack of due process.

If such brutality had been inflicted or caused by federal officers a serious question as to the means by which the conviction was secured might have arisen. See *Rochin v. California,* 342 U. S. 165. However, the arrest of Williams, as well as the arrest of the other defendants in this case, was at the hands of local officers and the United States had no control over this case until the release by the local authorities of the defendants to the United States. Since the federal Government had nothing to do with the instant brutality, we do not see why the United States should be deprived of such a percipient witness to the crime.

The fact that Mr. Williams told what he classed to be a lie to the police officers [R. T. 125], was beaten and then told the officers what he also stated to the trial court to be the truth, should merely go to the credibility of the evidence offered rather than to the competency or admissibil-

ity of such testimony. In *Cawley v. State,* 248 P. 2d 273 (Okla., 1952), illegal means had been used to obtain the testimony of a witness by the name of Weekly. The defendant therein contended that he had thereby been convicted without due process of law. The Court stated:

> "The foregoing methods may have prompted the testimony of Clarence Bo Weekly, and they may have been the means of obtaining the truth. Certainly the county attorney and the sheriff were acting beyond the law in holding Weekly in jail on the two occasions in question without process so to do. When officers so act they no longer are instruments of lawful administration of justice but become a law unto themselves. Of course the remedy for recompense for unlawful arrest and imprisonment is with Weekly, not this defendant. Furthermore, *the facts as hereinbefore related did not go to the competency of his evidence, but only as to its credibility. If duress or coercion was used to obtain the testimony of a witness, this fact goes to the credibility of the witness.* 70 C. J. 769, §934, Note 68 [98 C. J. S. 331, Witnesses §463] . . . the evidence thus obtained in the case at bar was entitled to the smallest weight but it was the jury's province to believe it if they so desired."

Thus, we believe no error was committed by the trial court below in receiving the evidence of the witness Williams.

IV.

The Prosecuting Attorney Committed No Misconduct.

Misconduct of the government's trial attorney is alleged in two respects. First, it is stated that the following remarks addressed to the Court immediately preceding the Court's acquittal of one of the codefendants were prejudicial:

> "Mr. Bevan: Your Honor, this is the government's last witness; but before I rest, I would like to make a statement to you.
>
> Whether or not I might think the defendant Jack is guilty of this offense, I do not consider there to be sufficient evidence to present the case to the jury. By our Rules we may dismiss a case on our own motion only by authority of the Department of Justice in Washington, so I don't have authority to do that. I do want to tell you that, in my mind, I, and I think any other Federal prosecutor, could not conscientiously give a case to the jury, whether or not they believe the man guilty, where there is such slight evidence of his guilt." [R. T. 185-186.]

At pages 5-6, and 12-13 of the Appellant's Brief, it is argued that such remarks of the prosecutor "implied great fairness on the part of the government and further implied overwhelming evidence of appellant's guilt as the only reason that prosecution against the latter was not dropped." No cases are cited as authority for the proposition that such remarks were prejudicial. We are frank to say that we do not see how implied fairness on the part of the government could prejudice this or any other criminal defendant. Further, we do not believe the re-

marks fairly can be construed to imply that there was overwhelming evidence of appellant's guilt as contrasted with that of the codefendant Jack. Even if they were so construed, it is permissible for a prosecutor to *directly* express *his belief* in the guilt of the defendant, if such belief is based upon the evidence and inferences therefrom, and certainly may state directly that there is overwhelming evidence of a defendant's guilt.

> *Henderson v. United States,* 218 F. 2d 14, 19 (C. A. 6, 1955);
>
> *Schmidt v. United States,* 237 F. 2d 542 (C. A. 8, 1956).

If it be permissible to directly state such an opinion (which was done by the prosecutor at page 193 of the Reporter's Transcript) then we see no misconduct arising from an implied such statement. In any event, immediately following the alleged prejudicial remarks of the prosecutor, the trial court stated:

> "I want to instruct the jury . . . that it is the position of the Court that no one should be convicted on suspicion. And because I am dismissing as to defendant Jack, it is not to be considered that the Court, in any way, intimates or suggests that the Court believes or *anybody else believes* connected with the case that the other two defendants are guilty or not guilty. That is a matter that is entirely your problem. . . . So, because I have dismissed this as to one defendant, I don't want to intimate in any way, shape, or form that I believe that the other two defendants are guilty. That is a question that is entirely your problem." [R. T. 186-187.]

If the above quoted remark of the prosecutor be considered to be error, it was immediately cured by the statements of the trial court.

The next act of misconduct which is attributed to the government trial attorney was that in argument, he implied "that the jury was a part and parcel of . . . the 'administration of justice'" (App. Br. p. 6). It is thus argued (App. Br. p. 13) that the prosecutor identified the jury with law enforcement rather than with their position as impartial judges, "thus adding further prejudice to the rights of appellant." The alleged misconduct in this respect consists of the following argument by the prosecutor:

> "Nevertheless, you will have occasion to go in and do your duty; *that is, to judge the evidence here;* and to do your duty just as Mr. Lee did when he saw these men out there and phoned the police. He did everything that he could. The police officers arrived immediately. You have seen a fine example of how police work can happen. They did everything that they could to bring in a proper case here to you. The inspectors have done their jobs. I have tried to do what little I had to do here, to present the evidence to you. And this final link, and more important one, in the chain of administration of justice is up to each of you ladies. Each of you is going to be called upon to do her duty this afternoon, or perhaps tomorrow. And I hope that when you go home and your verdict has finally been reached, you will be proud of yourselves and proud of the manner in which you reached your verdict and in the verdict that you yourselves have rendered."

In *Stewart v. United States,* 247 F. 2d 42 (C. A. D. C. 1957), an exhaustive and excellent review of federal cases

involving alleged misconduct of prosecutors is made by the dissenting judge, with whom three other Circuit Judges joined in the dissent. It is stated therein at page 51:

> "The cases disclose that alleged misconduct of a prosecutor in his argument to a jury is generally founded on a claim that he departed from his role as advocate by testifying as a witness not under oath and not subject to cross examination, or that his argument was so grossly, excessively inflammatory and his vilification of the defendant and his witnesses so extreme as to induce the jury to forsake the record and decide the issues on the basis of passion and prejudice [cases cited]."
>
> * * * * * * * *
>
> "For alleged misconduct because of abusive, inflammatory language to be error it must be shown to have been more than an isolated indulgence in the lurid or just any invocation of passion. To amount to legal error such conduct must be repeated, extreme, reckless and without regard for a trial based upon the evidence [cases cited]."
>
> * * * * * * * *
>
> "There are numerous decisions which take the position that error arising from improper argument can be cured by countervailing comment, by admonishing the jury to disregard the improper argument and not to treat it as evidence, or by instruction to the jury as to the function and purpose of argument [cases cited]."
>
> * * * * * * * *

"Furthermore, we are impressed by the fact that appellant's experienced counsel could have interposed some objection if, under the circumstances of the trial referred to above, the government attorney's remarks were prejudicial to his client. That one chiefly responsible for the protection of the accused did not object is persuasive that the alleged misconduct was not prejudicial [cases cited]. Defense counsel was present; he heard the statements this Court has questioned; he was aware of the emotional and psychological atmosphere prevailing at the trial; he, and not this Court, was the principal reliance of his client in protecting appellant's legal rights. He did not object. Can this Court, which has before it only paper and ink, determine better than he whether the prosecutor's remarks prejudiced appellant's case? We think not.

"Research indicates that, in order to be available as a basis for reversal on appeal, alleged improper argument should be objected to at trial [cases cited].

"The basis for this Rule is that a party should not be permitted to gamble on the possibility of a favorable verdict and then, when a verdict of guilty is returned, attack it because of alleged errors which could have been obviated had he interposed a timely objection [cases cited]."

* * * * * * * *

"To reverse this conviction implies that the attorney who afforded appellant a diligent and aggressive defense has standards of professional conduct so gross that he could not recognize improper and pre-

judicial conduct on the part of his adversary. It implies that defense counsel was less interested in providing adequate defense of his client and securing a fair trial than this court. Reversal on these grounds by this court would also imply that trial judges in this jurisdiction are either unaware of what constitutes a fair trial or less interested in insuring it than this court."

Very little can be added to the learned discussion that is set forth in the dissenting opinion in *Stewart v. United States, supra.* However, it always has been a well established rule that

> "In the closing argument to a jury, the government attorney is an advocate, as is counsel for defense, and proper oratorical emphasis is denied to neither [cases cited]."
>
> *Henderson v. United States,* 218 F. 2d 14, 19 (C. A 6, 1955), *supra.*

Also, it has long been the rule of this Court that there must have been an objection at the trial below to the alleged misconduct of the prosecutor to take advantage of the error on appeal. In *Alberty v. United States,* 91 F. 2d 461 (C. A. 9, 1937), the assignments of error raised questions as to the propriety of government counsel's conduct. This Court stated at page 463:

> "Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there should be none in claiming it against the prosecutor. It should be made at once. The Court should be given the opportunity for instant correction and, if the of-

> fense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the Court and jury, in an extended trial and, without objection or motion for relief, raise such questions on appeal."

It was stated in *Powell v. United States,* 35 F. 2d 941, 943 (C. A. 9, 1929):

> "It is next assigned as error that the Court should have instructed the jury to disregard a statement or offer made by the United States Attorney during the trial; *but it is sufficient to say that there was no request for any such instruction.*"

In summary, we do not believe that this Court should find that the prosecutor's remarks were in any sense "inflammatory" and thus error. In any event, no objection was made to either the argument of the prosecutor or his statement made immediately preceding the dismissal of the case against codefendant Jack. Moreover, at page 12 of the Reporter's Transcript, the prosecutor stated:

> "In my argument to you at the conclusion of the trial, and any statements I might make throughout the course of the trial are not to be considered by you as evidence. . . ."

Furthermore, the trial court stated, at page 222 of the Reporter's Transcript, to the jury:

> "You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action."

Thus, whatever conceivable prejudice might have been created by the alleged misconduct of the prosecutor, it would seem to have been cured by his own opening remarks to the jury and by the Court's final instructions.

V.

The Trial Court Properly Instructed the Jury.

It is alleged by appellant, upon the basis of various California decisions, that the experienced trial judge, Ben Harrison, did not properly instruct the jury as to certain elementary principles of federal law. First of all, appellant complains that the District Judge's instruction as to reasonable doubt "would seem to place less than the well-established burden upon the prosecution" (App. Br. pp. 6-7). We believe that we need only refer to pages 214-215, 217, 220 of the Reporter's Transcript wherein the Court gave its instructions as to burden of proof, presumption of innocence and reasonable doubt, and certain other matters, to advance sufficient argument in support of the Court's instructions.

At pages 18-19 of Appellant's Brief, it is also stated that there was omitted an instruction as to the testimony of an accomplice, the appellant citing a form California jury instruction, and thus it is alleged that error was committed thereby. In many respects, including this one, California and federal law are entirely different. As held by this Court in *Doherty v. United States,* 230 F. 2d 605 (C. A. 9, 1956):

> "This appeal from a judgment of conviction . . . is predicated upon the assumption that the California rule declining to credit testimony of an accomplice, unless corroborated, is applicable in the Federal Courts."
>
> * * * * * * * *
>
> "It is settled in this Circuit that, while received with caution and weighed with great care, the uncorroborated testimony of an accomplice is to be accorded whatever credibility the trier of facts may think it deserves."

Moreover, it is not error for a court to *refuse* to give an instruction regarding the credibility of an accomplice, and it is to be noted that in the instant case no request for an accomplice instruction was made.

Pina v. United States, 165 F. 2d 890 (C. A. 9, 1948), held:

> "This Court has held that refusal to give an instruction regarding the credibility of an accomplice is not reversible error."

See also:

> *Diggs v. United States,* 220 Fed. 545 (C. A. 9, 1915), affirmed 242 U. S. 470, 495.

Furthermore, as we interpret the evidence, no accomplice witness was used by the prosecution. The usual test of determining an accomplice was defined in *Stevenson v. United States,* 211 F. 2d 702 (C. A. 9, 1954), as being whether the supposed accomplice

> "could be convicted of the identical crime for which the defendant is being prosecuted."

See also:

> *Risinger v. United States,* 236 F. 2d 96, 99 (C. A. 5, 1956).

Although the appellant has not designated the person alleged to be an accomplice, we presume that he means Marvin Williams. According to the evidence introduced at this trial, we deem it inconceivable that Marvin Williams could have been convicted of the crime for which the appellant was prosecuted, or indeed, for any crime. Consequently, we believe that no error was committed by the trial court's failure to instruct on the testimony of an accomplice, first, because there was no such accomplice and, second, because such failure is not error according to decisions of this Court.

Conclusion.

There being no error in the trial below, the judgment of the District Court should be affirmed.

Respectfully submitted,

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